

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Chairman;
Tony Hammond, Vice Chairman;
Mark Acton; and
Nanci E. Langley

Statutory Review of the System
for Regulating Rates and Classes
for Market Dominant Products

Docket No. RM2017-3

ORDER DENYING MOTION FOR RECONSIDERATION

(Issued February 6, 2018)

I. INTRODUCTION

On January 5, 2018, the Public Representative filed a motion for reconsideration for several specific aspects of Order No. 4257.¹ For the reasons given below, the Commission denies the Motion.

II. PROCEDURAL HISTORY

39 U.S.C. § 3622(d)(3) directed the Commission to review the existing market dominant ratemaking system established by the Postal Accountability and Enhancement Act (PAEA) in order to determine if the system achieved the objectives of

¹ Motion by the Public Representative for Reconsideration, January 5, 2018 (Motion). See Order on the Findings and Determination of the 39 U.S.C. § 3622 Review, December 1, 2017 (Order No. 4257).

39 U.S.C. § 3622(b), taking into account the factors enumerated in 39 U.S.C. § 3622(c). This review represented a mandatory threshold inquiry; if the Commission determined that the system did not meet the objectives of section 3622(b), then it may modify or adopt an alternative system in a rulemaking. Order No. 4257 at 9.

The Commission initiated its review of the system by issuing an Advance Notice of Proposed Rulemaking (ANPR) which established a framework for the review and provided an opportunity for public comment.² The Commission sought comments on the process and structure of its review, the proposed metrics for analyzing the objectives of 3622(b), and input on whether the system achieved the objectives of the PAEA. Order No. 3673 at 10-11; Order No. 4257 at 6. The Commission also sought comments on “proposed modifications to the system or a proposed alternative system that should be adopted to achieve the objectives from commenters that conclude the system is not achieving the objectives.” Order No. 4257 at 6.

On December 1, 2017, the Commission issued its findings for the conclusion of its statutorily mandated review of the system as required by 39 U.S.C. § 3622(d)(3). See Order No. 4257. Under this review, the Commission found that the system was not achieving the objectives of section 3622(b), taking into account the factors enumerated in section 3622(c). Order No. 4257 at 275. After concluding that the system did not meet the objectives of the PAEA, the Commission instituted a rulemaking to “propose such modifications to existing regulations or adopt such an alternative system through new regulations that the Commission deems necessary to achieve the objectives of 39 U.S.C. 3622(b).”³ In Order No. 4258, the Commission proposed changes to title 39 of the Code of Federal Regulations that the Commission deemed “necessary to achieve the objectives of 39 U.S.C. 3622(b).” Order No. 4258 at 26. The rulemaking provides

² Advance Notice of Proposed Rulemaking on the Statutory Review of the System for Regulating Rates and Classes for Market Dominant Products, December 20, 2016 (Order No. 3673).

³ Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products, December 1, 2017, at 2 (Order No. 4258).

for both public comments and reply comments to allow participants input on the proposed rules. *Id.* at 3.

A. The Motion

In the Motion, the Public Representative requests that the Commission reconsider its determination in Order No. 4257 that “short-term financial stability has been maintained under the market dominant rate and classification system.” Motion at 1.

The Public Representative claims that the Commission’s conclusion that short-term financial stability has been achieved during the PAEA is a “significant error.” *Id.* at 3. He alleges error in the Commission’s short-term financial stability analysis on two grounds. First, he contends that there are multiple errors in the measurement of short-term financial stability. *Id.* at 4-6. Second, he alleges error in not accounting for the effects of defaulted statutory obligations or deferral of necessary investments. *Id.* at 6-7. As a consequence of the alleged errors, he states that, although the short-term financial stability finding does not “preclude its broader finding that the Postal Service’s overall financial stability has not been achieved,” the finding is “problematic because it is relied upon as a premise for the remedies proposed in Order No. 4258.” *Id.* at 3. As a consequence, he submits that the short-term financial stability conclusion precludes the Commission from crafting a remedy necessary “to correct the deficiencies in the current market dominant system.” *Id.*

With respect to errors in the short-term financial stability analysis, the Public Representative submits that the Commission improperly defined operating expenses by excluding the Retiree Health Benefits Fund (RHBF) obligations and including end-of-year cash reserves. *Id.* at 4. He contends that the Commission’s measurement of operating expenses improperly reduces the Postal Service’s total costs by excluding “interest expense..., and the accruals for payments to the RHBF, non-cash workers’

compensation, and supplemental contribution to the FERS annuity.”⁴ According to the Public Representative, this adjustment to total costs measures “net operating expenses,” not “operating expenses” as proposed by the Commission in the ANPR. Motion at 4-5. Although this calculation is used in the Commission’s Financial Reports, he claims that it should not have been used to analyze short-term financial stability because the purpose of the calculation in the Financial Reports is to provide “an in-depth analysis of the financial results” for the individual fiscal year.⁵ He claims that the Commission’s approach is closer to the Postal Service’s measure of “controllable (loss) income,” a “non-GAAP” measure that he implies should not have been used to analyze short-term financial stability. Motion at 5. Specifically, with respect to the Commission’s consideration of end-of-year cash reserves, he contends that the “problem with this rationale is that the end-of-year cash reserves relied upon by the Commission are, as the Commission forthrightly acknowledges, due to the Postal Service’s limitation of capital investment and nonpayment of the statutory RHBF payment obligations.” *Id.* at 6. He claims that the Commission’s consideration of such funds in its short-term financial stability analysis is unjustified. *Id.*

In addition to the treatment of the RHBF obligation and end-of-year cash reserves, the Public Representative claims that the Commission failed to include an analysis of “defaulted statutory obligations in the calculation of operating expenses or relying indirectly upon those defaults and the deferral of necessary investment is not justified.” *Id.* at 6-7. For this claim, he points to the central purpose of the PAEA that the Postal Service operate “in a businesslike manner using best business practices.” *Id.* He contends that defaulted obligations should not serve as a basis for the finding of short-term financial stability because “private commercial enterprises do not, and cannot, claim short-term financial stability by defaulting on their obligations or by deferring investments that are critical to their near-term continued operation.” *Id.* at 7.

⁴ *Id.* at 4 (citing Order No. 4257 at 160 n.263).

⁵ *Id.* at 5 (citing Financial Analysis of United States Postal Service Financial Results and 10-K Statement, March 31, 2017, at 5).

Finally, the Public Representative highlights the Postal Service's most recent default on the RHBF prefunding obligation and decrease in liquidity as support for his contention that the Postal Service is not financially stable in the short term. *Id.*

B. Responses to the Motion

PostCom et al. Response. In their response to the Motion, the *PostCom et al.* submit that the "Commission should decline to reconsider its finding in Order No. 4257 that the Postal Service has achieved short-term financial stability."⁶ Although *PostCom et al.* disagree with the Public Representative's contention that the Commission erred in finding that the Postal Service achieved short-term financial stability, they contend that the "Commission need not resolve this disagreement now" for procedural reasons. *PostCom et al. Response* at 1.

PostCom et al. submit that the Public Representative's challenge to a finding of Order No. 4257 is premature. *Id.* at 1-2. Specifically, the Public Representative's claim that a consequence of the Commission's short-term financial stability finding is that it will "adversely affect the timing of remedies" in the rulemaking presupposes that "the outcome of the ongoing rulemaking has already been determined." *Id.* at 2. *PostCom, et al.* posit that since the rulemaking is ongoing there is no remedy that could be provided by the Commission as any reversal of its short-term financial stability finding "would have no immediate effect on the Postal Service or its rates." *Id.* *PostCom et al.* claim that this "lack of remedy demonstrates that the Motion is procedurally premature and improper" and that [i]f the Public Representative believes that the remedies proposed by the Commission are insufficient, it is free to criticize them and propose alternatives in the ongoing rulemaking proceedings." *Id.* at 2-3.

In the alternative, *PostCom et al.* submit that, were the Commission to "treat its findings in Order No. 4257 as determining the outcome of the rulemaking proceeding,

⁶ Answer of Association for Postal Commerce, Alliance of Nonprofit Mailers, and MPA—The Association of Magazine Media to Motion for Reconsideration of the Public Representative, January 10, 2018, at 1 (*PostCom et al. Response*).

the final rules would plainly be in danger of being vacated by the D.C. Circuit.” *Id.* at 3. This is because the ANPR allegedly did not “provide sufficient notice of the criteria or approach the Commission would use to evaluate the current system of rate regulation, and it certainly did not provide an adequate opportunity to comment on the solutions....” *Id.* Therefore, PostCom *et al.* contend that the “Public Representative can raise all of the issues identified in its Motion in its comments in response to Order No. 4258....” *Id.* at 4.

Postal Service Response. In the Postal Service’s Response, it submits that the Public Representative’s claims are “not enough to warrant reconsideration of Order No. 4257.”⁷ The Postal Service contends that the Public Representative’s Motion, even if granted in full, would not change the Commission’s conclusion in Order No. 4257. Postal Service Response at 2. Further, the Public Representative does not introduce a “new concept for the current remedial phase of this proceeding.” *Id.* With respect to the substantive arguments, the “Public Representative acknowledges that operating profit (in the generally accepted accounting sense) is practically identical to net income, and the Commission has already identified net income as a problem that it intends to address.”⁸

However, while contending that the Public Representative’s claims are insufficient to warrant reconsideration, the Postal Service submits that his arguments should be considered in the rulemaking proceeding. *Id.* at 2-3. It contends that the Public Representative’s claims “could be relevant to the ultimate remedy proposed in Order No. 4258” and that the Public Representative acknowledges “that the motion is focused on the framing of an appropriate remedy, rather than altering the overall conclusion of Order No. 4257.” *Id.* at 3. As a result, the Postal Service seeks to have the “Commission invite the Public Representative and other parties to use their March 1 comments to discuss aspects of Order No. 4257 that may influence the remedy.” *Id.*

⁷ Response to the Public Representative’s Motion for Reconsideration, January 12, 2018, at 2 (Postal Service Response).

⁸ *Id.* (internal citations omitted).

The Postal Service claims that “[t]his would facilitate a streamlined discussion and conserve limited Commission and party resources” as opposed to “concurrent rulemaking and reconsideration proceedings.” *Id.*

GCA et al. Response. In their response, *GCA et al.* request the Commission deny the Public Representative’s Motion on the grounds that it is premature.⁹ In addition, *GCA et al.* submit that the Public Representative’s substantive arguments are unpersuasive. *GCA et al. Response* at 2.

First, *GCA et al.* disagree with the Public Representative’s position that the Commission’s short-term stability finding will affect the remedies proposed in the rulemaking. They maintain that it “is clearly premature to insist now that a preliminary finding, which does not restrict the Commission’s ability to conduct a full-scale review, must be reversed because it would, in the movant’s view ‘adversely affect’ proposed remedies which the Commission could amend, if appropriate, in the rulemaking proper.” *Id.*

Second, with respect to any differences in the measurement of short-term financial stability proposed in the ANPR and implemented in Order No. 4257, *GCA et al.* submit that the definitions in the ANPR were explicitly labeled as “provisional” and that the structure of the 3622 review proceeding “has thus always allowed for changes in what the Commission set out in the [ANPR]....” *Id.* at 3. Moreover, they contend that the definition of operating expenses in the short-term financial stability analysis is “both reasonable and fully supported.” *Id.* *GCA et al.* states that the exclusion of statutory obligations in the short-term financial stability analysis “shows merely that the Commission decided, quite reasonably, that they are not short-term factors.” *Id.* They also contend that the Public Representative ignores the distinction between “*short-term* financial stability and financial stability *tout court*” in alleging that the inclusion of cash reserves is erroneous. *Id.* at 4. They conclude by stating that “there clearly is no logical

⁹ Answer of Greeting Card Association and National Postal Policy Council to Public Representative’s Motion for Reconsideration, January 12, 2018, at 1 (*GCA et al. Response*).

error in stating that an entity can hold enough cash for short-term purposes by not meeting obligations that do not have to be met in the short term.” *Id.*

III. COMMISSION ANALYSIS

In Order No. 4257, as part of its review of the system, the Commission analyzed the Postal Service’s financial health during the PAEA era to determine “whether the system ‘assure[d] adequate revenues, including retained earnings, to maintain financial stability.’”¹⁰ As part of this analysis, the Commission reviewed the Postal Service’s short, medium, and long-term financial stability during the PAEA era. For its analysis of short-term financial stability, the Commission outlined its approach, explained its methodology, and conducted its review. Order No. 4257 at 157-165. The Public Representative’s Motion requests the Commission reconsider its finding that the Postal Service achieved short-term financial stability during the PAEA era.

In the Motion, the Public Representative advocates for a different approach to measure short-term financial stability that would incorporate the RHBF payment but exclude consideration of end-of-year cash reserves. He would also have the Commission analyze the impact of defaulted statutory obligations instead of relying indirectly on those defaults in its analysis. For these reasons, he claims that the Commission erred in its analysis of short-term financial stability. He contends that adopting his approach would better serve the Commission’s proposed solutions, as it would allow the Commission to support an accelerated remedy under the proposed rules set forth in Order No. 4258.

In consideration of the claims set forth in the Public Representative’s Motion, the Commission concludes that none of the asserted grounds for reconsideration have merit. The Motion fails to allege an error of fact or law sufficient to merit reconsideration of the short-term financial stability analysis and conclusion in Order No. 4257. Section 3622(d)(3) mandates that the Commission review the system under the PAEA to

¹⁰ Order No. 4257 at 151 (citing 39 U.S.C. § 3622(b)(5)).

determine whether it met the objectives of section 3622(b), taking into account the factors of section 3622(c). Section 3622(d)(3) does not prescribe any specific method for the Commission to follow in its review of the system; the approach was left to the Commission's discretion, as informed by the objectives and factors of the PAEA. As the Motion fails to point to any legal obligation to measure short-term financial stability as the Public Representative suggests, it does not demonstrate an error of law but rather a decision that courts have routinely left to the discretion of the agency.¹¹

The Motion also fails to allege any error of fact sufficient to warrant reconsideration of the short-term financial stability analysis. The Public Representative does not claim that the Commission's analysis contained any error in calculation; he alleges that the Commission should have taken a different approach. This difference in opinion on the approach to measuring short-term financial stability is not an error of fact. Moreover, even if the analysis cited by the Public Representative were to contain a factual error, he is free to raise those issues in the ongoing rulemaking to the extent his concerns relate to the proposed rules.

Accordingly, as the Public Representative does not raise any error of fact or law in the Commission's analysis of short-term financial stability, the Commission denies the Motion. To the extent the Public Representative's claims relate to the proposed rules or the justification underlying the proposed rules, he will have an opportunity to raise those issues in his comments.

IV. CONCLUSION

The Motion presents arguments that do not warrant reconsideration of Order No. 4257. Therefore, the Motion is denied.

¹¹ An agency is entitled to use its own methodology, unless it is irrational. *California v. Watt*, 712 F.2d 584, 596-597 (D.C. Cir. 1983).

V. ORDERING PARAGRAPH

It is ordered:

The Motion by the Public Representative for Reconsideration of Order No. 4257, filed January 5, 2018, is denied.

By the Commission.

Stacy L. Ruble
Secretary